In the High Court of Uttaranchal at Nainital.
Criminal Jail Appeal No. 285/2002

1- Sitting S/o Rajan
2- Rajan S/o Phool Chand,
3- Mohd. Rais S/o Mohd. Haneef ……..Appellants.

Vs.

State of Uttaranchal …..Respondent.

Sri Sanjeev Kumar Shah Learned Amicus Curiae for the appellants.
Sri A. Rab learned Additional Government Advocate for the State.
Date of Judgment 5-04-2004

ORAL JUDGMENT **(Per Hon'ble Irshad Hussain, J.)**

This jail appeal has been filed against the judgment and order dated 26.8.2002 passed by the Sessions Judge, Dehradun in Sessions Trial No. 45 of 2001.

2- The appellants were convicted and sentenced to undergo R.I. for five years and to pay a fine of Rs. 1000-00 each for having made an attempt to commit the murder of Dharma Bahadur at about 2 p.m. on 1.1.2001 in the canteen situate in the premises of New Empire Talkies in the town of Dehradun. The appellant Sitting had wielded knife in the incident and he was convicted under section 307 I.P.C. whereas the other two appellants Rajan and Mohd. Rais were convicted under section 307 with the aid of section 34 I.P.C.

3- According to the prosecution version these appellants felt displeased with the complainant-injured Dharam Bahadur Pradhan (P.W.1) on his demanding money due to him. At the time of the occurrence these three appellants one of whom namely appellant Sitting was then carrying a knife at the canteen and reprimanded the complainant. The appellant Sitting gave three blows of knife on the abdomen, hand and eye of the said victim and whereas the other two appellants assaulted him by fists and kicks. These three appellants then

ran away from there. Complaint injured was brought to the Dehradun Hospital by two constable and was admitted for treatment. In the hospital he got prepared a written report, Ext. Ka.1, by scribe Vassu Pradhan and sent it to the Police Station Kotwali Dehradun where on its basis check F.I.R. Ext.Ka 3 was recorded. Case under section 307 I.P.C. was registered against these appellants and after completion of the investigation they were charge sheeted and were sent up to stand trial before the Sessions Court.

4- Appellants did not admit the allegations of the prosecution and attributed their implication, in the case, to enmity.

5. At the trial prosecution in order to bring home the guilt to the appellants examined 8 witnesses. Of these, complainant –victim Dharam Bahadur (P.W.1) narrated the prosecution version as stated above to prove the prosecution case. Witness Rajendra Arora (P.W.2) was proprietor of the canteen where the incident took place. He has not supported the prosecution version and was declared hostile. Constable Birendra Singh (P.W.3) gave evidence in the nature of res gestae that while he was on duty at the picture hall he reached the scene of occurrence soon after the incident and was told by the Complainant-victim that he had been assaulted by the appellants Sitting, Rajan and Mohd. Rais. He then took the injured to the hospital with the help of his another companion on duty. Dr. G.P. Singh (P.W.4) was posted as Medical Officer, District Hospital Dehradun on 1.1.2001 and medically examined the said injured at 2.45 P.M. there he prepared injury report Ex. Ka.2 and the injuries were detected as fresh. The injuries detected were as under:-

1. Incised wound 1.5cm X 0.5 cm X scalp deep on left eye brow. Fresh blood was oozing.
2. Incised wound 1.5 cm X 0.5 cm X depth not probed on lower abdomen, 2 cm below umbilicus, at 6 o’clock positing. Fresh blood was oozing from the wound.
3. Incised wound 2 cm X 0.5 cm X muscle deep on anterior aspect in between thumb and index finger. Blood was oozing from the wound.

6- Medical Officer opined that the injuries were caused by sharp-edged weapon.

7- Head constable Sheel Gangey (P.W.5) is a formal witness of registration of the case etc. Dassu Pradhan (P.W.6) is the scribe of the written F.I.R. Ext. Ka. 1. Constable Vinod Kumar (P.W.7) is the another police personnel who had reached the scene of the occurrence and was told by the complainant-victim that he had been assaulted by the appellant. Sub Inspector A.P. Gautam (P.W.8) is Investigating Officer of the case and he proved the relevant steps taken in that record till the submission of the charge sheet, Ka.9 against the appellants. The other relevant documents were also proved by him.

8- Learned Sessions Judge on the basis of his appreciation of the evidence on record placed reliance on the evidence of the complainant- injured Dharam Bahadur (P.W.1) supported by the evidence in the nature of res gestae as given by constable Birendra Singh (P.W.3) and constable Vinod Kumar (P.W.7) and found the charges proved against the appellants and therefore convicted and passed sentence against them as aforesaid.

9. The learned Amicus Curiae Sri Sanjeev Kumar Shah argued that the evidence of the prosecution was shaky and indiscrepant and the learned Sessions Judge was not justified in placing implicit reliance on the evidence of above witnesses. It was also submitted that the F.I.R. of the case was ante-timed as is evident from the evidence of the complainant Dharma Bahadur (P.W.1) and scribe Dassu Pradhan (P.W.6) and therefore the very substratum of the prosecution story had been shaken and no reliance could have also been placed on the evidence of the witnesses in regard to the actual incident. It was also alternatively argued that in any case there was no reliable evidence to saddle the appellants Rajan and Mohd. Rais with the responsibility of commission of the crime in pursuance of the common intention of all the appellants with the aid of section 34 I.P.C. On the other had learned Additional Government Advocate argued that the evidence of the prosecution can not be taken to show that the F.I.R. was ante-timed and if P.W.1 and P.W.6 have due to ignorance of sense of time gave out that the written report was prepared at the hospital at about 10-11 p.m. and whereas the

check F.I.R. was prepared at 9.00 p.m. it can not be safely accepted that the F.I.R. was ante-timed. Further, it was argued that evidence of the injured alone was sufficient to prove the charges levelled against the appellants and since the assault was made in pursuance of the common intention the appellants Rajan and Mohd. Rais have also rightly been held guilty and convicted under section 307 read with section 34 I.P.C.

10. Having gone through the entire evidence and material on record it may be pointed out at the out set that the submission of the learned Amicus Carie that the charge against the two appellants namely Rajan and Mohd. Rais was not established beyond reasonable doubt has force and this appeal therefore deserve to be partly allowed in regard to these two appellants.

11. In the first instance it need to be stated that the check F.I.R. was recorded at 9.30 p.m. on 1.1.2001. No doubt P.W. 1 and P.W.6 gave out that the written F.I.R., Ext. Ka. 1 was prepared at the hospital at about 10-11 p.m. but I can not lose sight of the fact the time of preparation of F.I.R. was given by approximation and there being not much difference between 9.30 and 10.00 p.m. it can not be safely accepted that the F.I.R. was ante-timed. In other words the defence can not be permitted to take any benefit out of the said minor discrepancy which has resulted due to the lack of sense of correct approximation of the time by the injured and scribe of the F.I.R.

12- Complainant-injured Dharam Bahadur has corroborated the prosecution version and there is nothing substantial in his cross which took place at about 2 p.m. on 1.1.2001 and in which he was assaulted and was given knife blows on his eye-brow, abdomen and hand. He gave out that in the morning of the occurrence appellant Sitting took away his money but was apprehended and was brought to the police check post. He was let off on the assurance that he will return money to the complainant. After few hours at about 2 p.m. this appellant reached the canteen where the complainant was working and reprimanded him for demanding the money and at once started giving knife blows on the person of complainant. He sustained injures on the hand, eye brow and abdomen. The testimony of the complainant stand corroborated by

the medical evidence as it had been established that three injuries of sharp-edged weapon were detected on these parts of his body by the Medical Officer at about 2.30 p.m. and the injuries were then found fresh. No other injury was found on the person of the complainant although it has been claimed by him that the appellants Rajan and Mohd. Rais gave him blows of fists and kicks. It need to be stated here that according to the complainant-victim these two appellants reached at the scene of the occurrence after the complainant had already been assaulted by the appellant Sitting. The evidence of the complainant make it obvious that these two appellants were not accompanying the appellant Sitting and also that no injury of any blunt object which could be sustained by the blows of fists or kicks was found on his person indicating that these two appellants have had no role to play in the commission of the crime. In other words they were not there at the scene of the occurrence and question of their sharing common intention with appellant Sitting does not arise and they could not have been convicted under section 307 I.P.C. with the aid of section 34 I.P.C. In view of the above it is, however, apparently clear that the evidence against the appellant Sitting is reliable and sufficient to bring home the guilt to him and he was rightly convicted for attempting to commit the murder punishable under section 307 I.P.C.

13- Learned Amicus Curiae also argued that the sentence awarded against the appellant Sitting is severe. It was pointed out that the injuries were not found to be grievous as no supplementary injury report was produced by the prosecution and that in the face of the situation the appellant should not have been sentenced to five years R.I. Considering this aspect of the matter the submission of the learned Amicus Curiae has force and the ends of justice will be satisfied if the sentence against the appellant Sitting is reduced to sentence, for four years R.I. instead of five years R.I. with sentence to pay of fine of Rs. 1000/- as has been awarded by the learned Sessions Judge.

14- For the reasons aforesaid this appeal partly succeed and is to be allowed accordingly. The appeal is allowed. The appellants Rajan and Mohd. Rais are held not guilty and acquitted of the charge under section 307/34 I.P.C. They are in jail and they shall be released

forthwith if not wanted in connection with any other case. The conviction of appellant Sitting under section 307 I.P.C. is maintained. However sentence awarded per judgment and order dated 26.8.2002 by the Sessions Judge Dehradun is modified and reduced to sentence of 4(four) years R.I. and to pay a fine of Rs. 1000/- (one thousand). In default of payment of fine the appellant shall further undergo R.I. for 6(six) months.

15- Let the record be sent back to the court concerned for compliance. Compliance report be submitted to this court within one month.

The Amicus Curiae shall be paid the prescribed fee.

(Irshad Hussain, J.)

ISB